

THIRD DIVISION
SEPTEMBER 30, 2013

No. 1-11-1245

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 85C3428
)	
JOHN GILL,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *HELD:* Portion of the circuit court's order prohibiting defendant from making any additional postconviction relief filings until he satisfied a monetary fine was void as it exceeded the court's statutory authority.

¶ 2 Defendant John Gill appeals a circuit court order denying him leave to file a successive petition for postconviction relief filed pursuant to the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He does not raise any arguments with respect to the underlying merit of the claims advanced in his successive postconviction petition or the fine the

court imposed as a sanction for a frivolous filing; rather, he simply asserts that the court exceeded its authority when, in denying him leave to file the petition, ordered the clerk of the circuit court not to accept any additional filings from defendant until the fine was paid. For the reasons explained herein, we affirm the judgment of the circuit court and remand with directions.

¶ 3

I. BACKGROUND

¶ 4 Because defendant does not challenge the sufficiency of the evidence to support his conviction or raise any arguments with respect to the underlying merit of the claims advanced in his successive petition for postconviction relief, we will only briefly recount the relevant facts leading to his trial and subsequent conviction and provide a brief overview of defendant's post-trial filings that preceded the circuit court's order denying defendant leave to file the instant successive petition.

¶ 5 On March 6, 1985, a Church's chicken restaurant was robbed, and the restaurant's manager and a responding police officer were shot at by the fleeing offender. Defendant was arrested and charged with armed robbery and attempted murder in connection with those events. He elected to proceed by way of a jury trial.

¶ 6

Trial

¶ 7 At trial, the State presented evidence showing that at approximately 10 p.m. on March 6, 1985, a man wearing a black leather jacket walked into the Church's chicken restaurant located at the intersection of Madison Street and Pulaski Avenue, approached the counter, opened his jacket to display a gun, and demanded that Alice Campbell, the cashier, empty the contents of the restaurant's registers into a bag. Once Campbell complied with his request, the man took the

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money and fled from the restaurant.

¶ 8 Greg Davis, the manager of the restaurant, observed defendant take the money and pursued him out of the restaurant. As Davis chased defendant down Pulaski Avenue, defendant turned around and shot at Davis. Defendant's errant shot did not hit Davis, but Davis stopped his chase and flagged down a nearby police car that was being driven by Chicago police officer Joseph Lombardi. After relaying what had taken place, Davis joined Officer Lombardi in the police vehicle.

¶ 9 Officer Lombardi drove the vehicle for several blocks before Davis saw defendant, wearing his black leather jacket, walking down the street. After Davis identified defendant as the offender, Officer Lombardi exited his vehicle and ordered defendant to stop. In response, defendant fired two gunshots in his direction. Officer Lombardi radioed for assistance, continued his pursuit, and exchanged gunfire with defendant.

¶ 10 Chicago police officer Michael Mullen and his two partners responded to the radio call. As he was maneuvering their squad car down a nearby alley, defendant ran out in front of the car. He was attempting to remove his black leather jacket as he continued to run. After stopping the squad car, Officer Mullen and his partners pursued defendant on foot. They were ultimately able to corner defendant and apprehend him in another gangway. In a search conducted immediately following the chase, officers recovered defendant's black leather jacket with \$80 in the pocket. A search of defendant's pants pocket revealed \$56 and a live .357 bullet. No gun was found.

¶ 11 Campbell and Davis were subsequently shown physical lineups at the police station. Both witnesses identified defendant as the offender. A gunshot residue test was performed on

defendant, the results of which were positive for gunshot residue.

¶ 12 Based on the aforementioned evidence, defendant was found guilty of armed robbery and the attempted murders of Greg Davis and Officer Lombardi. Following his conviction, the State filed a motion seeking to have defendant adjudicated a habitual criminal given his extensive criminal history. At the sentencing hearing that followed, the State presented evidence of defendant's prior Class X convictions. Based on evidence that defendant had committed two prior Class X offenses, the court adjudicated defendant a habitual criminal and sentenced him to mandatory life imprisonment.

¶ 13 Direct Appeal

¶ 14 In his direct appeal, defendant challenged his conviction and the sentence imposed thereon, arguing: (1) the State failed to present sufficient evidence to prove him guilty of the charged offenses beyond a reasonable doubt; (2) the trial court erred in allowing the bullet found in his pocket to be entered into evidence; (3) he was denied his constitutional right to effective assistance of trial counsel; (4) the Illinois Habitual Criminal statute was unconstitutional; and (5) he was unlawfully sentenced to life imprisonment as a habitual criminal because the State failed to prove his prior felony convictions beyond a reasonable doubt. In a written opinion, this court found defendant's contentions of error to be without merit and affirmed his conviction and sentence. *People v. Gill*, 169 Ill. App. 3d 1049 (1988).

¶ 15 Collateral Proceedings

¶ 16 Defendant filed his first petition for postconviction relief on July 9, 1991. In the petition, defendant raised several of the same issues that he raised on direct appeal and added some

additional claims. Specifically, defendant argued: (1) he was not proven guilty of armed robbery and attempted murder beyond a reasonable doubt; (2) the indictment was insufficient because it did not specify the requisite mental state for the charged offense of attempted murder; (3) the court's instructions to the jury pertaining to the offense of attempted murder were improper; (4) he was denied his constitutional right to a fair trial; (5) the court erred in admitting the results of the gunshot residue tests because the defense had been precluded from performing an independent test; (6) his sentence was imposed in violation of the constitutional prohibition against cruel and unusual punishment; and (7) the State failed to prove that he was subject to a mandatory life sentence as a habitual criminal.

¶ 17 Counsel was appointed to assist defendant with his petition. After reviewing defendant's filing, postconviction counsel elected not to supplement defendant's *pro se* petition for post-conviction relief. The State subsequently filed a motion to dismiss, arguing that defendant's "allegations fail[ed] to raise any constitutional questions within the purview of the Post-Conviction Hearing Act." Moreover, the State argued that defendant's allegations were necessarily "barred by the doctrines of *res judicata* and waiver," because each of the allegations contained in defendant's *pro se* filing "were either raised on direct appeal and were actually adjudicated adversely to the petitioner by the Illinois Appellate Court on direct appeal, or could have been raised but were not raised by the petitioner in his direct appeal." After hearing arguments on the matter, the trial court granted the State's motion to dismiss.

¶ 18 Defendant filed a second *pro se* postconviction petition on March 12, 2001. In his successive petition, defendant challenged the constitutionality of the Illinois Habitual Criminal

Offender Act, arguing that it violated the tenets of *Apprendi v. New Jersey*, 530 U. S. 466 (2000).

The court dismissed the petition on March 26, 2001, finding that "the Habitual Criminal Offender Act is not within the purview of *Apprendi*. Therefore, this is not a substantial violation of Mr. Gill's constitutional Rights to require relief under the Post-Conviction Act."

¶ 19 Defendant filed the instant petition on December 28, 2010. In his third *pro se* petition for postconviction relief, defendant again challenged the admissibility of the gunshot residue test results during his trial. Specifically, he asserted that because the defense had been denied the opportunity to independently test the gunshot residue samples, he was denied his constitutional right to due process of law. In a related claim, defendant alleged that appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 20 In a written order, the court denied defendant leave to file his third *pro se* petition for postconviction relief, explaining:

"In the present case, petitioner has failed to demonstrate that the rule prohibiting successive petitions should be relaxed. Although the factual assertions relied on by petitioner in the instant petition were available to him at the time his initial petition was filed, he has failed to identify any objective factor, which impeded his efforts to raise the claim in the earlier proceedings. Petitioner does not allege that the facts underlying his present claim were withheld from him or that the claim is based upon newly discovered evidence. Rather, petitioner asserts that he was unable to allege this claim earlier because the gunshot residue test had been destroyed.

It is further apparent that petitioner has failed to demonstrate that any prejudice

inured from the failure to assert this claim earlier. Had this claim been presented in the initial petition, there is scant probability that petitioner would have prevailed. Petitioner's convictions and sentences were affirmed on direct appeal. Further, petitioner filed pre-trial motions to suppress the gunshot residue results and the bullet, which were denied by the trial court. Additionally, petitioner challenged the introduction of the gunshot residue test in his initial post-conviction petition. Thus, this claim is frivolous and without merit.

Petitioner makes no showing that the absence of the claim now presented so infected the trial that his resulting conviction or sentence violated due process. As such, petitioner is hereby fined \$105.00 and the Clerk of the Circuit Court will be instructed not to accept any further filings from petitioner until his sanction has been satisfied in full.

Petitioner should also know the Illinois Criminal Code provides that his good time to [*sic*] be taken away for filing frivolous motions."

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant does not challenge the court's finding that his successive petition was frivolous and patently without merit; rather, he merely challenges the portion of the court's prohibiting him from filing any additional pleadings until the \$105 fine is paid in full. Defendant asserts that the court exceeded its statutory authority in imposing the sanction. He further argues that the court's sanction, in addition to being improper pursuant to Illinois statute, was also unconstitutional because it effectively denied him his due process right to meaningful access to the courts.

¶ 24 Initially, the State responds that defendant's claim is speculative in nature and "is not ripe for review," given that he has not presented any evidence that he "has not or cannot satisfy the fee requirement." On the merits, the State maintains that the circuit court's order should be upheld because courts have the "inherent authority *** to curb frivolous litigation through the use of filing restrictions."

¶ 25 Before addressing the substantive merit of defendant's appeal, we first reject the State's argument that the case is not ripe for adjudication. A controversy is ripe "when it has reached a point where the facts permit an intelligent and useful decision to be made." *People v. P.H.*, 145 Ill. 2d 209, 219 (1991). Here, defendant is challenging the very substance of the circuit court's order and the court's authority to enter such an order. His ability or inability to satisfy the fine is immaterial with respect to our review of the underlying propriety of the court's order. Accordingly, we find the matter ripe for review.

¶ 26 Although the circuit court did not cite to any specific statutory provision in its written order imposing the fine, the parties agree that the sanction was imposed pursuant to section 22-105 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/22-105 (West 2010)), which, in pertinent part, provides as follows:

"§ 22-105. Frivolous lawsuits filed by prisoners:

(a) If a prisoner confined in an Illinois Department of Corrections facility files a pleading, motion, or other filing which purports to be a legal document in a case seeking post-conviction relief under Article 122 of the Code of Criminal Procedure of 1963, pursuant to Section to 116-3 of the Code of Criminal Procedure of 1963, in a habeas

corpus action under Article X of this Code, in a claim under the Court of Claims Act, or a second or subsequent petition for relief from judgment under Section 2-1401 of this Code or in another action against the State, the Illinois Department of Corrections, or the Prisoner Review Board, or against any of their officers or employees and the Court makes a specific finding that the pleading, motion, or other filing which purports to be a legal document filed by the prisoner is frivolous, the prisoner is responsible for the full payment of filing fees and actual court costs.

On filing the action or proceeding the court shall assess and, when funds exist, collect as a partial payment of any court costs required by law a first time payment of 50% of the average monthly balance of the prisoner's trust fund account for the past 6 months. Thereafter 50% of all deposits into the prisoner's individual account under Sections 3-4-3 and 3-12-5 of the Unified Code of Corrections administered by the Illinois Department of Corrections shall be withheld until the actual court costs are collected in full. The Department of Corrections shall forward any moneys withheld to the court of jurisdiction. If a prisoner is released before the full costs are collected, the Department of Corrections shall forward the amount of costs collected through the date of release. The court of jurisdiction is responsible for sending the Department of Corrections a copy of the order mandating the amount of fees to be paid. *Nothing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs.*" (Emphasis added.) 735 ILCS 5/22-105(a) (West 2010).

¶ 27 The purpose of this statutory provision is "to curb the large number of frivolous collateral

proceedings filed by prisoners which adversely affect the efficient administration of justice, and to compensate the courts for the time and expense incurred in processing and disposing them."

People v. Conick, 232 Ill. 2d 132, 141 (2008).

¶ 28 Defendant asserts that the portion of the court's order prohibiting the clerk of the circuit court from accepting any future filings until his \$105 fine is satisfied conflicts with the express language of section 22-105(a) of the Code which mandates that "[n]othing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs." 735 ILCS 5/22-105(a) (West 2010). We agree.

¶ 29 This court recently resolved this exact issue in *People v. Chambers*, 2013 IL App (1st) 100575. In that case, the circuit court denied the defendant leave to file a successive petition for postconviction relief, fined the defendant, and included language barring the defendant from filing any additional postconviction proceedings until the monetary fine was paid in full. The defendant challenged the propriety of the court's order on appeal and we found that the circuit court exceeded its statutory authority by imposing the sanction, explaining:

"[T]he section of the circuit court's order stating 'the Clerk of the Circuit Court will be instructed not to accept any further filings from [defendant] until his sanction has been satisfied in full' conflicts with the plain and ordinary language of section 22-105 of the Code (735 ILCS 5/22-105 (West 2010)), which provides that '[n]othing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs.'" The circuit court in this case effectively prohibited defendant from making future filings based on court costs assessed despite the clear language stating

otherwise in section 22-105 of the Code. 735 ILCS 5/22-105 (West 2010). Therefore the circuit court erred when it included this language into its order denying defendant leave to file his successive petition." *Chambers*, 2013 IL App (1st) 100575, ¶ 28.

¶ 30 We found that our interpretation of the statute was supported by the supreme court's holding in *People v. Alcozer*, 241 Ill. 2d 248 (2011), where the court upheld the constitutionality of section 22-105 of the Code, rejecting the defendant's argument that the fines permitted by that statutory provision violated his due process rights, reasoning:

"From a plain reading of section 22-105, we determine that the statute does not impinge upon a prisoner's fundamental right to access to the courts because fees are assessed only after a legal document is found to be frivolous. At most the statute only affects a prisoner's right to file frivolous legal documents without being responsible for the costs, but does not prohibit prisoners from exercising their right to petition for postconviction relief." *Id.* at 260.

We concluded that our holding and interpretation of the statute was consistent with the *Alcozer* court's holding that section 22-105 " ' does not prohibit prisoner's from exercising their right to petition for post-conviction relief.' " *Chambers*, 2013 IL App (1st) 100575, ¶ 29, quoting *Alcozer*, 241 Ill. 2d at 260. Because we found that the court exceeded its statutory authority in ordering the clerk of the circuit court from accepting further filings until the defendant satisfied his fine in full, we found that portion of the court's order void, and remanded the case with directions to vacate that language from its order. *Id.* at ¶ 31.

¶ 31 We find no reason to depart from our decision in *Chambers* in this case. Because

defendant does not challenge the circuit court's finding that his successive petition for post-conviction relief was frivolous or the propriety of the \$105 fine, we affirm that portion of the circuit court's order. However, because we find that the court exceeded its statutory authority in conditioning defendant's future filings on his satisfaction of the \$105 fine, we remand this cause to the circuit court to vacate the following language from its order: "the Clerk of the Circuit Court will be instructed not to accept any further filings from petition until his sanction has been satisfied in full." See *Chambers*, 2013 IL App (1st) 100575, ¶ 42. Because we resolve defendant's challenge to the court's order on statutory grounds, we need not address his argument pertaining to the constitutionality of the court's order. See *People v. Jackson*, 2013 IL113986, ¶ 14 (reciting the general principal that reviewing courts should only address constitutional issues "as a last resort"when a case cannot be resolved on nonconstitutional grounds).

¶ 32

III. CONCLUSION

¶ 33 The judgment of the circuit court is affirmed and remanded with directions.

¶ 34 Affirmed and remanded with directions.